Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1122

STATE OF LOUISIANA,
Respondent,

versus

JAMES PARISI, ROBERT D. WERKAU, JR.,
KENNETH P. BAKUTIS, and FRANK BRITTON,
Petitioners-Relators.

PETITION FOR WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE SUPREME COURT OF LOUISIANA, IN CASE NO. 58529, OF THE DOCKET OF THAT COURT

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STATE OF LOUISIANA,
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JAMES PARISI, ROBERT D. WERKAU, JR.,
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PETITION FOR WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE SUPREME COURT OF LOUISIANA, IN CASE NO. 58529, OF THE DOCKET OF THAT COURT

Petitioners James Parisi, Robert D. Werkau, Jr., Kenneth P. Bakutis and Frank Britton, petition the Court to issue a writ of certiorari to review the judgment of the Supreme Court of Louisiana dated November 19, 1976, in Case No. 58529 of the docket of that court, denying the issuance of a writ of review in the matter entitled "State of Louisiana v. James Parisi, Robert D. Werkau, Jr., Kenneth P. Bakutis and Frank Britton", Case No. 254-139 of the docket of the Criminal District Court for the Parish of Orleans, Louisiana, Section "J".

A copy of the judgment and the reasons for judgment of the Supreme Court of Louisiana is printed in the appendix.

JURISDICTION

The judgment of the Supreme Court of Louisiana was dated November 19, 1976. No rehearing was applied for as Rule IX of the Louisiana Supreme Court Rules provides that a rehearing will not be considered when the judgment of the court was denying an application for a writ of certiorari. The jurisdiction of this court is invoked under the provisions of 28 U.S.C. Section 1257(3).

QUESTION PRESENTED FOR REVIEW

The question presented for review is whether or not the trial judge, in the absence of a jury, denied defendants the rights guaranteed to them under Amendments IV, V, VI, VIII and XIV of the United States Constitution.

PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT

1. *United States Constitution,* Amendment IV, (The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated . . .)

2. *United States Constitution,* Amendment V, (No person shall be . . . deprived of life, liberty, or property without due process of law . . .)

3. *United States Constitution,* Amendment VI, (In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .)

4. *United States Constitution,* Amendment VIII, (. . . excessive fines (shall not) be imposed, nor cruel and unusual punishments inflicted).

5. *United States Constitution,* Amendment XIV, (. . . nor shall any state deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws).

6. *Constitution of 1974 of the State of Louisiana,* Art. 1, Sect. 2. (No person shall be deprived of life, liberty or property, except by due process of law).

7. *Constitution of 1974 of the State of Louisiana,* Art. 1, Sect. 3, (No person shall be denied equal protection of the laws . . .)

8. *Constitution of 1974 of the State of Louisiana,* Art. 1, Sect. 5, (Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy . . . Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court).

9. *Constitution of 1974 of the State of Louisiana*, Art. 1, Sect. 16, (. . . An accused is entitled to confront and cross-examine the witnesses against him . . .)

10. *Constitution of 1974 of the State of Louisiana*, Art. 1, Sect. 20, (No law shall subject any person . . . to cruel, excessive, or unusual punishment . . .)

11. *Louisiana Supreme Court Rules*, Rule 9, (An application for rehearing will not be considered when the court has merely granted or denied an application for a writ of certiorari or a remedial or other supervisory writ, . . .).

12. *Louisiana Code of Criminal Procedure*, Art. 213, (A peace officer may, without a warrant, arrest a person when . . . (2) The person to be arrested has committed a felony, although not in the presence of the officer; (3) the peace officer has reasonable cause to believe that the person to be arrested has committed an offense although not in the presence of the officer . . .)

13. *Louisiana Revised Statutes*, Title 14, Sect. 25, (An accessory after the fact is any person, who, after the commission of a felony, shall harbor, conceal, or aid the offender, knowing or having reasonable ground to believe that he has committed the felony, and with the intent that he may avoid or escape from arrest, trial, conviction, or punishment . . .)

14. *Louisiana Revised Statutes*, Title 14, Sec. 34, (Aggravated Battery is a battery committed with a dangerous weapon . . .)

15. *Louisiana Revised Statutes*, Title 14, Sect. 108, (Resisting an officer is the intentional opposition or resistance to, or obstruction of, an individual acting in his official capacity and authorized by law to make a lawful arrest . . . when the offender knows or has reason to know that the person arresting . . . is acting in his official capacity. The phrase "obstruction of" as used herein shall, in addition to its common meaning, significance and connotation mean: (a) Flight by one sought to be arrested before the arresting officer can restrain him and after notice is given that he is under arrest. (b) Any violence toward or any resistance or opposition to the arresting party is actually placed under arrest and before he is incarcerated in jail . . .)

16. *Louisiana Revised Statutes*, Title 40, Sect. 966, (. . . it shall be unlawful for any person knowingly and intentionally: (1) To produce, manufacture, distribute or dispense or possess with intent to produce, manufacture, distribute, or dispense, a controlled dangerous substance classified in Schedule I; . . .)

17. *Louisiana Revised Statutes*, Title 40, Sect. 968, (. . . it shall be unlawful for any person knowingly or intentionally; (1) To . . . possess with intent to . . . distribute . . . a controlled dangerous substance classified in Schedule III. . .)

18. *Louisiana Revised Statutes*, Title 40, Sect. 964, (. . . Schedule I. . . C. Hallucinogens . . . (10) Marijuana . . . Schedule III . . . B. Depressants . . . (1) Any substance which contains any quantity of a

derivative of barbituric acid, or any salt of a derivative of barbituric acid . . .)

STATEMENT OF CASE

This is a case wherein the relators were denied the rights guaranteed to them by:

1. Amendment IV of the United States Constitution (the right to be secure in their persons, houses and effects from unreasonable searches and seizures);

2. Amendment V of the United States Constitution (the right not to be deprived of their liberty without due process of law);

3. Amendment VI of the United States Constitution (the right to be confronted with the witnesses against him);

4. Amendment VIII of the United States Constitution (the right not to be imposed with excessive fines or inflicted with cruel and unusual punishment);

5. Amendment XIV of the United States Constitution (the right to immunity from the denial of due process of law and equal protection of the laws by a state).

This is evident from the following facts:

On February 24, 1976, at about 1:30 A.M., the relators, James Parisi, Robert D. Werkau, Jr., Kenneth P.

Bakutis and Frank Britton were all peacefully present in a mobile home parked in a crowded trailer park in suburban New Orleans. They had travelled in the mobile home from their homes in Illinois to visit New Orleans for the Mardi Gras. They had arrived earlier on the previous day.

Except for a small light in the cab, all of the lights were out in the mobile home.

As previously stated, all of the relators were peacefully present in the mobile home minding their own business. James Parisi, Robert D. Werkau, Jr., and Kenneth P. Bakutis were asleep in one part of the mobile home; Frank Britton was having intercourse with a female by the name of Barbara Conn who was also a defendant with them, but who is not involved in this appeal, in another part of the mobile home.

The New Orleans Police received a call that someone had been shot at the trailer park.

At this point a little local flavor has to be injected to understand within its proper framework what occurred next.

As previously stated the relators had travelled to New Orleans to join in the Mardi Gras festivities. Mardi Gras Day, being the Tuesday before Ash Wednesday, falls on different days in different years. In 1976 it fell on February 24th the day on which the relators were arrested.

Hundreds of thousands of visitors pour into New Orleans every year to participate in the abandon that

Mardi Gras promises. The king of Mardi Gras, Rex, is called "the Lord of Misrule". Mardi Gras events start months before Mardi Gras day. For several weeks before Mardi Gras there is a succession of parades each one viewed by hundreds of thousands of people. The policing of the Mardi Gras events greatly taxes the time and patience of the New Orleans Police. They have to work 12 to 18 hours per day handling excited people; moving hundreds of thousands of people around; directing the flow of traffic of tens of thousands of vehicles in a minimum time with a minimum of accidents to the point whereby, by the time Mardi Gras comes, they are tired out; their nerves are raw; their patience exhausted: and they are inclined to overreact, even if they are not naturally inclined in that direction anyway.

This is the subjective state of affairs as it existed when the police were informed that someone had been shot at the trailer park. At least three, and probably many more police cars responded to the call. Police Officers Marcel David, Carl Schmidt, Earl Blache and Sergeant Fayard were among those who responded.

On arriving at the scene they found a man, among *hundreds* of other people who were lodged at the trailer park, who complained that he had been shot by one or more men allegedly from Chicago.

We must pause momentarily in the recitation of the facts to observe that on the trial of the case

1) the police did not know the name of the alleged victim;

2) the police did not even record the nature and extent of his injuries;

3) no evidence was offered to prove that a person was shot, if in fact there was one, let alone by whom he was shot;

4) no attempt was made to identify the relators or anyone of them as the assailant.

As far as the record in this case is concerned, the alleged victim could have been feigning injury; could have injured himself; could have been injured by someone other than one of the relators; could have been injured in some way other than by gunshot; could have spilled tomato catsup on himself.

The police had never seen the alleged victim before; never had any prior contact with him; never saw him afterwards; never had any earthly reason to believe that the man was telling the truth.

Here we would like to point out the lack of probable cause for the subsequent conduct of the police.

Without stopping for verification, the police set out to find a trailer, any trailer, with an Illinois license plate on it, presuming that therein would be found the culprits.

En route, they met another unidentified witness. As with the previous witness, they had never seen this witness before; had never had any previous contact

with him; never have seen him since; and considered him so reliable that they did not even record his name. This man allegedly pointed out the mobile home in which the relators were present as the haven of the assailants.

Armed with the unverified and uncorroborated information of the two unidentified and unreliable informants, and with no other probation, despite the fact that there were hundreds of other witnesses in the vicinity, the police led by Officer David went charging up to the mobile home.

Again, let us pause to observe that at this time everything was quiet in and about the mobile home:

1) the lights were out;

2) there was no outward signs of activity inside;

3) the mobile home was at rest and parked;

4) no threat emanated from inside the mobile home against the police or any other person.

It was subsequently revealed that the police did not have a warrant to search the mobile home.

Mention of the attendant circumstances is made to point out that no condition existed obviating the necessity for having a search warrant and ample opportunity was afforded to obtain one. The relators

were not running away; they were not trying to destroy evidence; they were not threatening the police with a weapon; they had no ability to remove goods or evidence from the jurisdiction. No "exigent circumstances" existed to excuse the police from obtaining a search warrant.

The police led by Officer David proceeded to bang on the side of the mobile home. Robert D. Werkau, Jr., who owned the mobile home, sleepily and only partially dressed, opened the door. When he did the police screaming an identity and flashing flashlights in his face yanked the door open spilling Werkau outside into the night.

What followed thereafter must have been sheer bedlam. Imagine the reaction of the relators Parisi, Werkau and Bakutis, being rousted from their sleep by a bunch of wild men flashing flashlights into their sleep-dimmed eyes while they barked incoherent orders; and hustling them around while they were half asleep and half dressed, for some unannounced reason.

Imagine the surprised and startled reaction of Frank Britton, who was having intercourse with Barbara Conn and was interrupted by a group of storm troopers flashing blinding lights into his face and shouting unintelligible identification and orders. Some way or other without someone getting killed, the police hustled all of the relators including Barbara Conn out of the mobile home. Who did what to whom, and with what and how is as inconclusive and contradictory as all of the other evidence in this case. Four

police said they did, and four relators said they did not. So on the balance, the finger-pointing and the weight of the evidence is even, and the state can surely not be considered to have proven the guilt of the relators beyond a reasonable doubt.

Having now rousted the relators out of the mobile home, the police lined them up outside, half-naked, spread-legged, against the side of the mobile home, except for Frank Britton, who was spread-eagled on the ground, and Barbara Conn, whose femininity they chivalrously respected by treating her more gently. The police then reentered the mobile home and searched it.

At this point an ample second opportunity was afforded the police to obtain a search warrant if they desired. If an emergency or "exigent circumstances" previously existed it no longer existed. The relators now had no ability to run away; gain possession of a weapon; destroy evidence; or remove goods or evidence from the jurisdiction. But the police obviously did not think that they were required to observe this constitutional safeguard even though they were sworn to uphold and defend it.

Sometime thereafter, the police placed the relators, including Barbara Conn, under arrest, although relators defy anyone to establish from the testimony adduced on the trial of this case who did so, and to whom, when, for what, why and how. At no time were the relators identified by anyone although there were *hundreds* of witnesses present on the scene available for that purpose.

Nonetheless, all of the relators, and Barbara Conn were taken to the Central Lock-up of the New Orleans Police Department, and booked with Aggravated Battery (LRS 14:34), Possession of Barbiturates with Intent to Distribute (LRS 40:968), Possession of Marijuana (LRS 40:966), and Resisting Arrest (LRS 14:108). Despite being booked with four violations, the District Attorney filed only two Bills of Information against the relators. Case No. 254-139, for resisting and obstructing the police while making a *lawful* arrest, which is the case before this court, and Case No. 254-140, for possession of barbiturates with intent to distribute.

Barbara Conn was allowed to plead guilty in Case No. 254-139 and was sentenced to serve fifteen days in the Parish Prison with credit for time served. Case No. 254-140, as to her, was nolle prosequied.

Prior to entering upon the trial of the two cases, relators through counsel, filed numerous motions in both cases. At that time relators Parisi, Werkau and Bakutis were represented by the counsel before this court, Gerard H. Schreiber, Esq., who filed the motions and relator, Britton, was represented by Howard McCurdy, Esq., a Public Defender, who joined in the motions.

In this application for certiorari all of the relators, Parisi, Werkau, Bakutis and Britton are represented by the same counsel, Gerard H. Schreiber, Esq.

The motions filed in both cases have to be mentioned, as they were companion cases, and one motion

filed in Case No. 254-140 is significant to the case at bar.

In Case No. 254-139, the relators filed

1) A Brady Motion;

2) A Motion to Quash;

3) An Application for a Bill of Particulars.

The Brady Motion was answered by the state which was deemed sufficient by the defense, but the court never ruled on the motion or its answer prior to trial.

The Motion to Quash urged the unconstitutionality of LRS 14:108 and contained a rule nisi against the state. It was never answered by the state, nor was it ruled upon by the court before trial.

In other words, the court overlooked ruling on both motions.

The Application for a Bill of Particulars asked for and received the following particulars:

1) The "lawful arrest" that the police officers was making was because the "defendants were believed in possession of Controlled Dangerous Substances";

2) The "law or laws" that the defendants were violating was "the defendants were

believed to have violated Articles 40:966 and 40:968 of the *Louisiana Criminal Code*".

3) The "act of obstruction" for which the defendants were charged occurred under "LRS 14:108(a) and (b)";

4) The arresting officers did not have a search warrant;

5) The arresting officers did not have an arrest warrant;

6) The arrest was made under "Article 213(2)" of the Louisiana Code of Criminal Procedure.

In Case No. 254-140, the relators filed similar and additional motions, one of which is significant to the case at bar. The defense filed a motion to disclose all informers and the state answered that "there was no informer involved".

This is very important as when Case No. 254-139 was tried, it developed that the whole basis for the search and subsequent arrest was the two "informers" — the man allegedly shot, and the man who pointed out the mobile home.

On June 7, 1976, Case No. 254-140 was tried without a jury and all of the relators were found not guilty.

Immediately, afterwards, Case No. 254-139 was called for trial despite the fact that there were undis-

posed motions extant, one of which, the Motion to Quash the Bill of Information on the grounds of the unconstitutionality of LRS 14:108, was scheduled for a hearing on that day on the rule nisi.

Rule IX of the Rules of the Criminal District Court for the Parish of Orleans provides:

> Each party opposing the motion shall serve and file no later than one day before the hearing a brief written statement of the reasons advanced in opposition to the motion and a list of citations of the authorities on which he relies.

This requirement was not observed. The motion was not ruled on. The case proceeded to trial.

The state immediately moved as follows:

> Your Honor, at this time the state would like to amend its Bill of Particulars in 254-139, its Paragraph 2 thereof. The question asked is the exact nature of the lawful arrest that Officers David, Schmidt and Blache made as alleged in the Bill of Information, the state would amend its answer at this time to say that all or either of these defendants were arrested for aggravated battery *or* being an accessory after the fact in that they did after the commission of a felony, either harbor, conceal or aid the offender, knowing or having reasonable grounds to believe he committed a felony. (Emphasis added).

It should be remembered that the state had originally answered the Application for a Bill of Particulars by saying that the "lawful arrest" was the "defendants were believed in possession of Controlled Dangerous Substances" and "to have violated Articles 40:966 and 40:968 of the *Louisiana Criminal Code*". (Emphasis added).

The words "Louisiana Criminal Code" is emphasized because there are no Articles 40:966 and 40:968 of the *Louisiana Criminal Code*.

But the defendants having been found not guilty in Case No. 254-140 wherein they were charged with "possession of a controlled dangerous substance, to-wit: Barbiturates", the state saw the necessity for changing its game plan otherwise they had no "lawful arrest" to rely on and tried to amend its Answer to the Bill of Particulars, but in so doing

1) it charged the violation of two separate and distinct crimes in the disjunctive, viz, Aggravated Battery (LRS 14:34) or Accessory After the Fact (LRS 14:25) which is prohibited by Louisiana law, and,

2) it failed to correct the other averment of its answer that "the defendants were believed to have violated Articles 40:966 and 40:968 of the *Louisiana Criminal Code*", which if not wrong before, was surely wrong now and should have been amended also.

The defense moved to quash the Bill of Information as amended by the state, because it charged the defendants in the disjunctive contrary to law. The court seemed to agree that if this had occurred in a Bill of Information, the motion would be correct, but, since it occurred in a Bill of Particulars, it was not.

It was pointed out to the court that according to Louisiana law an answer to a Bill of Particulars becomes part of the Bill of Information, but the court persisted in its ruling.

The case was tried without a jury and the court found all four defendants "guilty as charged".

The defense filed a Motion for a New Trial based on

1) The court's oversight in failing to rule on the Motion to Quash the Bill of Information because of the unconstitutionality of LRS 14:108;

2) The denial of due process because the defendants were arrested without a warrant and as a consequence of an unconstitutional search;

3) The verdict was contrary to the law and the evidence because the state did not prove an essential element of the crime charged;

The defense filed a Motion in Arrest of Judgment

1) Reurging the constitutionality of LRS 14:108;

2) The court's ruling denying the Motion to Quash based on the disjunctive charge.

The court denied both motions.

Although Barbara Conn had been sentenced to serve only fifteen (15) days in the Parish Prison, relators Parisi, Werkau and Bakutis were each sentenced to serve four months in the Parish Prison; to pay a fine of $500 or to serve forty-five additional days in the Parish Prison in default thereof; and to pay court costs of $60.00 or serve fifteen additional days in the Parish Prison in default. Relator, Britton, was sentenced to serve six months in the Parish Prison.

Application was made to the Supreme Court of Louisiana for a writ of review which was denied on November 19, 1976. A copy of the judgment of that court is printed herein in the Appendix.

No rehearing was requested as Rule IX, Section 6 of the Louisiana Supreme Court Rules provides same will not be considered.

ARGUMENT

This is a classic case of overreaction by a police department under stress and the propensity of a court to defend the integrity of the police resulting in the constitutional rights of a group of citizens being grossly violated.

The importance of this case is not minimized because of the insignificance of the offense — resist-

ing arrest — for therein lies the first constitutional outrage. The relators Parisi, Werkau and Bakutis were sentenced to four months in jail plus forty-five days in default of a $500 fine plus $60.00 court costs or to serve fifteen more days in the Parish Prison in default thereof, and the relator, Britton, was sentenced to six months in jail. Their co-defendant, Barbara Conn, had been sentenced to fifteen days for the same offense.

It is a matter of common knowledge that the sentence given Barbara Conn is generally that which is given for resisting arrest, rather than that meted to Parisi, Werkau, Bakutis and Britton.

Can it be inferred that Conn got an insignificant sentence because she pleaded guilty, whereas Parisi, Werkau, Bakutis and Britton were wasted because they pleaded not guilty requiring their being tried?

The Fourteenth Amendment to the *United States Constitution* requires that all citizens have equal protection of the laws. Equal protection imports equal application. Perhaps not on complete parity, but not such disparity as to outrage justice.

Also, since the sentence given to the relators is in complete disparity with that usually given for the same offense, the defendants were subjected to "excessive fines" and "cruel and unusual punishments". *U. S. Constitution*, Amendment VIII.

Relators do not mean to infer that Barbara Conn should have been given the same sentence that they received. To the contrary, they assert that the sen-

tence Barbara Conn was given is that customarily given for "resisting arrest" and the severe sentence given them constitutes an excessive, cruel and unusual punishment and unequal application of the law in violation of their constitutional rights.

Equal protection also requires that the state abide by the rules established by itself.

When the state failed to conform with Rule IX of the *Rules of the Criminal District Court for the Parish of Orleans* and assert an opposition to the Motion to Quash the Bill of Information the court should have sustained the motion and the trial never should have been held.

Since the court did not impose the same obligation on the state as its rules impose on the defense, the defense were denied "equal protection of the laws".

Sometimes the line between "due process" and "equal protection" is obscure. However it is felt that when established state law is not followed by the court that established it, both "equal protection" and "due process" are denied.

In *State v. Lemoine*, 152 So. 907, the Louisiana Supreme Court held that the particulars furnished by the state in an answer to an Application for a Bill of Particulars is "deemed, in law, to constitute a part of the bill of indictment".

When the state verbally amended its Bill of Information to provide that

> . . . . all or either of these defendants were arrested for aggravated battery *or* being an accessory after the fact . . . .

according to *State v. Lemoine*, supra, the state had amended the Bill of Information. If this be true, then the defendants had been charged with committing Aggravated Battery (LRS 14:34) *or* Accessory After the Fact (LRS 14:25). But these are two different crimes charged disjunctively and Louisiana law prohibits charging "disjunctively or alternatively" in the same Bill of Information.

In *State v. Sullivan*, 55 So. 588, the Louisiana Supreme Court held that "an indictment or information must not charge a party disjunctively or alternatively in such manner as to leave it uncertain what is relied on as the accusation against him".

Louisiana Code of Criminal Procedure, Article 6.

Unless the context clearly indicates otherwise:

1) The word "and" indicates the conjunctive;

2) The word "or" indicates the disjunctive;

. . . .

Relators were tried under a Bill of Information that by definition of the law of Louisiana and decision of the Louisiana Supreme Court was fatally defective denying to defendants due process and equal protection of the law. *United States Constitution*, Amendments V and XIV.

Mention must be made of another inconsistency in the Bill of Information as extended by the Answer to Application for a Bill of Particulars.

The state's answer stated that the defendants were believed to have violated Articles 40:966 and 40:968 of the *Louisiana Criminal Code*. (Emphasis added).

There are no Articles 40:966 and 40:968 of the *Louisiana Criminal Code*. There are Articles 40:966 and 40:968 of the *Louisiana Revised Statutes*, but these are articles of Title 40 of the Louisiana Revised Statutes, whereas the Criminal Code is Title 14 of the Louisiana Revised Statutes and all articles of this title are preceded by the suffix 14, for example, Aggravated Battery (14:34), Accessory After the Fact (14:25). LRS 40:966 and 40:968 each apply to Controlled Dangerous Substances.

The relators having been found not guilty in Case No. 254-140 relating to possession of a controlled dangerous substance with intent to distribute, the state sought to amend the Bill of Information in Case No. 254-139 by amending their answer to the Application for a Bill of Particulars, which they did in one respect but not in both respects.

So that after the amendment was made, applying the decision of the Louisiana Supreme Court in *State v. Lemoine*, supra, the relators were charged with resisting a "lawful arrest" for Aggravated Battery *or* Accessory After the Fact and the "law or laws" that they were violating were believed to be "Articles 40:966 and 40:968 of the Louisiana Criminal Code "which was disjunctive and inconsistent.

It will be remembered that the state answered the Application for a Bill of Particulars saying the police had neither a search warrant nor an arrest warrant.

Addressing ourselves first to the lack of a search warrant, it was pointed out in the Statement of Facts that the opportunity was afforded to the police twice to obtain a search warrant — once when they first approached the motor home, and again when all of the relators were outside of the motor home and in custody.

It was also pointed out in the Statement of Facts that in Case No. 254-140, the allied case to the case at bar, the state answered there were no "informers".

But it developed on the trial of the case at bar that the case originated as a consequence of a warrantless search based on not one but two "informers" — the man allegedly shot and the man who pointed out the mobile home — neither of whom were asked to identify the defendants at the scene of the alleged offense nor were they called to testify at the trial. As a matter of fact, the police testified they did not even know their names.

Aside from all of the other unconstitutional considerations, relators were never afforded the right granted to them by the Sixth Amendment of the *United States Constitution*, namely, that of being confronted with the witnesses against them.

When a search is made *without* a warrant based on information furnished by an "informer" a greater burden rests on the state to prove the reliability of the

"informer" than in cases where a search is made *with* a warrant based on information furnished by an "informer". *Hart v. U. S.*, 162 F. 2d 74. And when the reliability of the "informer" is made an issue, the burden rests on the state to prove the "informer's" reliability.

Also, when a search is made *without* a warrant to make it justified "exigent circumstances" must exist in addition to probable cause. *Chambers v. Maroney*, 90 S. Ct. 1971, 399 U. S. 42. The burden is on the state to prove "exigent circumstances" which are limited to

a) Response to an emergency;

b) Hot pursuit of a fleeing felon;

c) Goods or evidence in process of destruction; and

d) Goods or evidence about to be removed from the jurisdiction.

Prescinding from the reversible fact that the state misled the defense into believing there were no "informers" in this case, the state made no effort to prove "reliability", nor "exigent circumstances".

Applying the "fruit of the poisonous tree doctrine" (*Silverthorn Lumber Co. v. U. S.*, 251 U. S. 385, 40 S. Ct. 182) to this case forces the conclusion that since its genesis was iniquitous, relators should have been found not guilty.

This conclusion carries over to the next point of

constitutional transgression, viz, the relators were arrested without a warrant of arrest.

Louisiana requires that a police officer have a warrant except when "the person to be arrested *has* committed a felony, although not in the presence of the officer." *La. C. Cr. P. Art. 213(2).*

Relators contend that the state, therefore, had the burden of proving that they *had* committed a felony. The state had to prove that they had committed an aggravated battery (LRS 14:34) or *had* harbored a felon *knowing or having reasonable grounds to believe that he committed a felony with the intent that he may avoid or escape from arrest, trial, conviction or punishment* (LRS 14:25).

In *State v. Finklea*, 313 S. 2d 224, the Supreme Court of Louisiana said that "when there is no warrant, police may arrest only when the one arrested has committed a felony or has committed a misdemeanor in his presence . . . ."

Since the police had no evidence that the relators *had* committed a *felony*, the police had no authority to arrest them without a warrant, and their arrest was not a "lawful arrest" and the relators had every right to resist the police, if in fact they did.

In *City of Monroe v. Dugas, et al*, 203 La. 974, 14 S 2d 781, the Louisiana Supreme Court said in a similar case wherein the defendants were charged with resisting a warrantless arrest

> The right of personal liberty is one of the fundamental rights guaranteed to every citizen, and any unlawful interference with it may be resisted. Every person has a right to resist an unlawful arrest, and in preventing such restraint of his liberty, he may use such force as may be necessary . . . .
>
> A prosecution will not lie for resisting an officer where the officer is attempting to make an unlawful arrest.

Lastly, relators requests that the scrutiny of the court be directed toward the unconstitutionality of Article 108 of the Louisiana Criminal Code entitled "Resisting An Officer". (LRS 14:108).

It will be observed that this article reprobates "the intentional opposition or resistance to or obstruction of" an officer and further defines with certainty what is meant by "obstruction of". But the article supplies no definition for "opposition or resistance to" thereby leaving this definition to be supplied by the whim of the arresting officers, the prosecutor or the trial court.

A standard of constitutional requirement is that criminal laws be sufficiently definite to adequately inform persons charged of the nature of the charge against them to enable them to prepare their defense thereby affording "due process" and "equal protection".

In *State v. Clark*, 325 S 2d 802, the Louisiana Supreme Court said

> It is well settled that in order to comply with Constitutional safeguards, penal statutes must describe the unlawful conduct with sufficient particularity and clarity that ordinary persons of reasonable intelligence are capable of discerning its meaning and conforming their conduct thereto.

Relators submit that LRS 14:108 lacks both particularity and clarity and is therefore unconstitutional.

In closing relators urge that their convictions were in transgression of their unviolate rights guaranteed to them by Amendments IV, V, VI, VIII and XIV of the *United States Constitution*.

They were even denied "due process" in that the evidence offered against them did not prove an essential element of the crime with which they were charged.

In answer to the Application for a Bill of Particulars, the state replied that relators were charged under subsections (a) and (b) to LRS 14:108 proscribing

(a) *Flight* by one sought to be arrested *before* the arresting officer can restrain him and *after notice* is given that he is under arrest;

(b) Any *violence* toward or any resistance or opposition to the arresting officer after the arrested party is *actually* placed under arrest and before he is incarcerated in jail.

Considering these provisions LRS 14:108 proscribes

(a) Flight before restraint and after notice;

(b) Violence after an actual arrest.

In other words, it is not all "resistance", "opposition" or "obstruction" that is a crime. The article specifically declares what act is a crime.

Previously it was stated that the record defies ascertainment of who did what, to whom, how, when and why. This was not an attempt to be facetious. It is a true and accurate comment borne out by the record itself.

This incertitude should have been reconciled in favor of relators.

But the trial court chose to reconcile it in favor of the arresting officers presumably, perhaps, on the theory that seems to pervade criminal courts that all policemen tell the truth while all defendants lie.

No presumption to this effect exists in law, but there is a presumption that "if a party has a witness within his power to produce, and fails to produce him, and offers no explanation for such failure, the presumption or inference is that the witness, if produced, would not support his case or would be against him". *State v. Johnson*, 151 La. 625, 92 So 139.

By the police's own testimony there were hundreds of impartial civilian witnesses to the occurrence between them and relators. The state chose not to produce them and offered no explanation for failing to do so. This fact, alone, if no other, proves that the state had no viable case against relators and relators were denied their constitutional rights and a writ of certiorari should be granted herein.

Respectfully submitted,

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CERTIFICATE

I certify that copies of this petition were served on the Attorney General of Louisiana and District Attorney for the Parish of Orleans, Louisiana, by placing a copy in the United States Mail, addressed to them at their respective offices postage prepaid.

GERARD H. SCHREIBER

APPENDIX

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

November 19, 1976

STATE OF LOUISIANA

versus No. 58,529

JAMES PARISI, ROBERT D. WERKAU, JR., KENNETH P. BAKUTIS AND FRANK BRITTON

In re: James Parisi, Robert D. Werkau, Jr., Kenneth P. Bakutis and Frank Britton, applying for writ of certiorari and review.

Writ denied. There is no merit to this application.

/s/ FWS
/s/ JWS
/s/ AT, Jr.
/s/ JAD
/s/ WFM
/s/ JLD

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
November 19, 1976
/s/ Phil Trice
Deputy Clerk